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In the

Supreme Court of the United States

October Term, 1962

No. 970

Edward J. Brunenkant,

Petitioner

v.

Anthony J. Celebrezze, Secretary
Of Health, Education and Welfare,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

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OPINION BELOW

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on October 31, 1962. Decision of the Court is in this petition, Appendix pp. 16-23.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 31, 1962. Thereafter petition for rehearing was filed and denied on Januray 2, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. #1254 (1).

QUESTIONS PRESENTED

1. Whether the salaries paid to the petitioner by the Commodity Investment Corporation for services as its president and attorney for the years 1955, 1956 and 1957 constitute "wages" for the said years under the Social Security Act?

2. Whether the income of the petitioner for the years 1955, 1956 and 1957, derived from his activity as a member of the Chicago Board of Trade and engaged as an Odd-lot Futures Specialist in wheat futures on the Exchange Floor, constituted self-employment income for the said years under the Social Security Act?

3. Whether petitioner's activity as an Odd-lot Futures Specialist for the years 1955, 1956 and 1957 constituted the business of a dealer in commodity futures so as to bring his income derived from such activity within the exclusions from capital gain income provided in the capital asset statutes and constitute it self-employment income under the Social Security Act?

STATUTES AND REGULATIONS INVOLVED

"Definition of wages:—The term "wages" means*** remuneration paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash***." S.S.A. #209; 42 U.S.C. #409.

"Definition of employment: — The term "employment" means*** any service of whatsoever nature, performed after 1950 either (A) by an employee for the person employing

him, irrespective of the citizenship or residence of either, (1) within the United States." S.S.A. #210 (a); 42 U.S.C. #410 (a).

"Definition of American employer:—The term "American employer means an employer which is*** (6) a corporation organized under the laws of the United States or of any state." S.S.A. #210 (e); 42 U.S.C. #410 (e).

"Definition of employee: — The term "employee" means (1) any officer of a corporation." S.S.A. #210 (k); 42 U.S.C. #410 (k).

Definition of self-employment income, S.S.A. 211 (a), 42 U.S.C. #411 (a). Quoted verbatim at page 13 herein.

Definition of "capital asset", 1954 Internal Revenue Code, 26 U.S.C. #1221 (1). Relevant part at pages 13-14 herein.

Definition of "trade or business" as used in the Social Security and Revenue Acts:

> "The term, 'trade or business' when used with reference to self-employment income, shall have the same meaning as when used in Section 23 of the Internal Revenue Code." S.S.A. #211 (c), 42 U.S.C. #411 (c).

Sections 23 and 161 of the Internal Revenue Code fail to define "trade or business" or "carrying on a trade or business". This Court has noted such fact in Higgins v. Comm., 312 U.S. 212 wherein it stated:

> "No regulation has ever been promulgated which interprets the meaning of 'carrying on a business' nor any rulings approved by the Secretary of the Treasury.*** To determine whether the activities of a taxpayer are 'carrying on of a business' requires an examination of the facts in each case."

G.M.C. 19322, XV-2 Cumm. Bull. 192-5 quoted at page 10 herein.

FACTS RELATING TO THE COMMODITY INVESTMENT CORPORATION

The Commodity Investment Corporation is a duly organized and operating corporation under the laws of Illinois. Its

charter, granted on November 14, 1953, provided it with broad powers to buy and sell commodities, commodity futures, stocks and bonds, oil and mineral rights and leases and to deal in real estate or any interest therein. Its original authorized capital issue consisted of 1,000 shares of common of $1.00 par value and 10,000 shares of 8% Cumulative preferred of a par value of $100.00 per share. (R. 136-7-8-9.)[1]

The common stock was owned by the plaintiff, his wife and children. The plaintiff was the duly elected president of the corporation and his wife and daughter were also officers. (R. 225, 37, 85.)

The corporation's office and address was 2785 Prairie Avenue, Evanston, Illinois, where it shared with the plaintiff in his home a fully equipped law office with adequate telephone service. (R. 95.)

By appropriate resolution the corporation's Directors at a meeting held on November 30, 1953, employed the plaintiff as its attorney.

The major activity of the corporation during its formative years, 1954 through 1957, were concerned with its efforts to distribute its preferred stock to private investors. The necessity of qualifying such issue before the several Security Commissions and the negotiation and execution of Underwriter contracts required a considerable amount of legal effort and research extended over a prolonged period. (R. 38.)

During the years 1955, 1956 and 1957, the corporation traded in commodity futures listed on the Chicago Board of Trade. For this purpose it used its own capital of $1,000.00 and some additional borrowed capital. As president, the plaintiff directed all of the corporation's trading transactions. They were entered in the corporation's trading account with the Uhlmann Grain Company to whom the corporation paid the

1 Record references are to Administrative Records filed with the Court of Appeals.

usual customer's commission on every transaction. (R. 40, 104-5.)

There was not at any time any mingling or commingling of the transactions or accounts of the petitioner with those of Commodity.

The net earnings of Commodity from its trading operations, exclusive of the salaries paid to the plaintiff, were as follows (R. 154, 161, 285, A. p. 28):

1955	$4,500.00
1956	356.00
1957	1,827.00

Each year, by appropriate resolution, the corporation's Directors provided a salary for its president of $4,200.00 annually. (R. 132-3-4, A. p. 27.)

The corporation records show that salary payments were made in cash and promissory notes of the corporation as follows:

Year	Total Payment	Medium of Payment	Amount in Each Medium
1955	$4,200.00	Cash t D. I. Revenue	$ 624.00
		Cash to Plaintiff	3,576.00
1956	$4,200.00	Cash to D. I. Revenue	624.00
		*Notes Payable	3,576.00
1957	$4,200.00	Cash to D. I. Revenue	526.52
		*Notes Payable	3,673.48

* Notes payable, bearing interest at 4% per annum, were subsequently paid at face value plus accrued interest by the issuance therefor of 8,000 shares of the common stock of the Commodity Investment Corporation, with a par value of $1.00 per share. (R. 226-7, A. p. 29.)

The Commodity Investment Corporation withheld from the salaries payable to the petitionor his liability for income and social security taxes thereon in the amounts of $624.00 for each of the years 1955 and 1956 and $526.52 for the year 1957 and with its own liability for Federal Insurance Contribu-

tion taxes on such salaries, it paid to the Director of Internal Revenue, Chicago, the following amounts (R. 251 to 256):

1955	$708.00
1956	708.00
1957	621.00

Commodity's tax returns show salary payments as expense deductions for each of the years 1955, 1956 and 1957 in the amount of $4,200.00 After office audit by the Bureau of Internal Revenue, they were approved as filed. R. 39.)

The petitionor reported on his personal income tax returns the salaries received from the Commodity Investment Corporation in the amount of $4,200.00 for each of the years 1955, 1956 and 1957. (R. 39.)

FACTS RELATING TO PETITIONER'S ACTIVITY AS AN ODD-LOT FUTURES SPECIALIST

The Chicago Board of Trade functions both as a cash grain and futures market. Approximately one-third of its membership of 1425 are engaged as cash grain dealers with their businesses conducted either from the Exchange Floor or from grain elevators scattered over the grain producing areas.

There are two Board of Trade contracts in grain futures. One is a 5,000 bushel contract which is widely used and the other, a 1,000 bushel contract, which is little known beyond the Exchange membership. It is called an odd-lot contract and was created to supply the hedging needs of the cash grain dealers whose transactions with producers were generally made in lots of less than 5,000 bushels. To supply the hedging needs of the cash grain dealers there assembled in each grain pit a small group of members, known as odd-lot specialists, who dealt exclusively in odd-lot futures and whose trading was confined to the cash dealers since traders, speculators and investors rarely traded or were interested in the lesser 1,000 bushel contract.

The activity of the petitioner as an Odd-lot Futures Specialist required the investment of capital in a Board of Trade membership, in inventories of futures and in operating costs.

During each daily session of the Exchange, the petitioner was stationed at one end of the wheat pit on the Exchange Floor prepared to buy or sell to his cash dealer customers odd-lot wheat futures in any quantity at a price of ⅛ of a cent per bushel from the quoted round-lot, 5,000 bushel, price. Petitioner realized a gross profit of $1.25 on each completed odd-lot, 1,000 bushel, transaction.

It was part of the business process in petitioner's activity that he maintain at all times large inventories of odd-lot futures either in an inventory "short" position resulting from sales of odd-lots to his customers or in inventory "long" position resulting from purchases of odd-lots from his mustomers. It was his practice to keep his inventory in odd-lot futures, at all times during and after market sessions, completely hedged in concurrent futures. Such hedging practice resulted in inventories of both odd-lot and round-lot futures, i.e., petitioner's "long" position in odd-lots would be hedged in a corresponding "short" position in round-lots of the same future or his "short" position in odd-lots would be hedged in a "long" position of round-lots.

The effect of petitioner's hedging practice was to insure his inventories of odd-lot futures from risk of loss arising from price swings in the futures during the interim period pending inventory liquidation. At the same time, such hedging preserved his merchandising mark-up of ⅛ of a cent per bushel reflected in his inventory prices. While his inventory hedging insured petitioner against inventory price swing losses, it at the same time precluded inventory price swing profits. Its net effect was to create for petitioner a non-speculative inventory position in futures. Therefor, petitioner's earnings from his activity, depended solely upon the volume of his transactions. For the years 1954 to 1957, inclusive, his net earnings from this activity were as follows:

1954	$12,262.30
1955	5,681.00
1956	4,950.00
1957	4,545.19 (R. 106.)

Copies of the plaintiff's daily inventories for the last trading days of March and November for each of the years 1955, 1956 and 1957 are in the Administrative record. (R. 180 to 198, incl.) An examination of plaintiff's inventory of March 29, 1956 (A. pp. 35-36), shows his inventory hedged position to be as follows:

"Long" Position	"Short" Position
May Wheat Futures	
165 job-lots, 165,00 bu.	33 round-lodts, 165,00 bu.
July Wheat Futures	
15 job-lots, 15,00 bu.	3 round-lots, 15,000 bu.
September Wheat Futures	
1 round-lot, 5,000 bu.	4 job-lots, 4,000 bu.

On March 29, 1956, the plaintiff's inventory of futures consisted of 370,000 bushels with 369,000 bushels hedged and 1,000 bushels unhedged.

REASONS FOR ALLOWING THE WRIT

1. The decision of the Court of Appeals herein is in conflict with decisions of the Court of Appeals for the Ninth Circuit in Stark v. Flemming, 283 F. 2d 410 and Flemming v. Lindgren, 275 F. 2d 596. These cases hold it error for the Secretary to disregard the corporate entity in a social security case where there has been adherence to the normal corporate routines. They also hold that motivation of a wage earner to secure social security benefits through a family owned corporate set-up is not a valid defense to defeat coverage where bona fide services have been rendered to the corporation by the officer-employee.

In a per curiam decision, the Court in the Stark case reversed the District Court, which upheld the Secretary in his defense that the corporate set-up was a device and sham used to secure social security coverage for the plaintiff. Quoting from the Court's opinion:

> "But here there seems to have been proper adherence to the normal corporate routines. And it is difficult to understand how the corporate arrangement would not have to be respected by others than the Secretary. And we think he must respect it, too. * * * * * Congress could have provided that motivation to obtain social security by organizing a corporation would defeat the end. It did not."

The Ninth Circuit decisions in the aforesaid cases have been quoted with approval and followed in two recent social security decisions, — Enke v. Ribicoff, 197, F. Supp. 319 and Brannon v. Ribicoff, 200 F. Supp. 697.

2. Petitioner believes that the Court of Appeals decision is in conflict with the decision of this Court in Corn Products Refining Co. v. Comm. of I.R., 350 U.S. 46 which was relied upon by the appellant as being dispositive of the second issue as to whether his income, realized from his activity as an Odd-lot Futures Specialist, constituted self-employment income under the Social Security Act.

As an Odd-lot Futures Specialist on the Chicago Board of Trade, the petitioner maintained at all times large inventories of odd-lot wheat futures to supply the needs of his customers who were members of the Exchange operating as cash grain dealers. To protect and insure such odd-lot inventories from risk of loss arising from price swings in the futures and to preserve his gross profit mark-up of ⅛ of a cent per bushel during the interim period of inventory disposition, petitioner hedged his odd-lot futures in round lots of the same futures or, as is generally termed, in concurrent futures. Such hedges were made as simultaneous transactions with purchase or sale-

of odd-lot futures during a market session. Such practice resulted in the maintenance at all times of a 99% hedged inventory position.

The Court of Appeals in its opinion stated that petitioner's reliance on Corn Products was "misplaced" in that he was not a manufacturer, processor or handler of actuals and that his purchases and sales of futures were not perfectly matched nor made at identical prices but, were made at a differential of 1/8 of a cent per bushel.

Petitioner believes that the Court's interpretation of the Corn Products decision is incorrect; that such decision does not impose any limitation of engagement in a particular business or activity to qualify as a bona fide hedger nor does such decision indicate a requirement that in bona fide hedging the purchases and sales be perfectly matched or at identical prices.

In the Corn Products opinion, this Court stated that it had recognized for 20 years the Treasury pronouncement contained in G.C.M. 17322, XV-2 Cumm. Bull. 152-5 which distinguished speculative transactions in commodity futures from hedging transactions. It held that hedging transactions were essentially to be regarded as insurance rather than a dealing in capital assets and that gains and losses therefrom were ordinary gains and losses. Its pertinent provisions follow:

> "Where future contracts are entered into to insure against * * * risks inherent in the taxpayer's business, the hedging operation should be recognized as a legitimate form of business insurance. * * * Future contracts which are not hedges against spot transactions are speculative unless they are hedges against concurrent futures or forward sales or purchases."

This Regulation expressly recognizes hedges against concurrent futures as being non speculative even though they are not hedges against actuals, — spot transactions.

All of petitioner's hedging transactions were in concurrent futures. They were entered into for the sole purpose of in-

suring his inventories of odd-lot futures from the risk of loss arising from the price swings in the futures during the interim inventory disposition period. Such hedging practice was an integral part of his business process which assured and preserved his gross profit mark-up of 1/8 of a cent per bushel on each odd-lot transaction.

Accordingly, the Court of Appeals requirement that bona fide hedging in commodity futures be limited to a processor, manufacturer or handler of actuals is in conflict with G.C.M. 17322 and the decision of this Court in Corn Products.

The other requirements of the Court Appeals decision that in bona fide hedging the purchases and sales must be evenly matched and at identical prices are contrary to established hedging practice. In an early tax case, Stewart Silk Corporation, 9 Tax Court, 179, the Court held:

> "Petitioner makes no contention that it sought to hedge its entire market risk 100 per cent. And, we do not understand that in order to constitute a true hedge, it was necessary for petitioner to cover his entire inventory and offset every purchase of actuals with a corresponding future's contract."

The other requirement of the lower court that purchases and sales be made or matched at identical prices is an impractical limitation on bona fide hedging. When futures are hedged against actuals, the hedger rarely, if ever, is able to make his purchases of actuals and his sales of futures at identical prices. Seldom, if ever, are spot and future prices identical and generally the price spread is substantial.

3. Petitioner believes that the Appellate Court in holding that his income from his Board of Trade activity constituted capital gain income results from a broad construction given to the term, 'capital asset' which is in conflict with the rule of construction applied by this Court in Corn Products.

> Quoting from the poinion of the Appellate Court:
> "And to the extent that his future commitments remained unmatched he took the full risk of price swings. * * * the

fact that plaintiff chose contemporaneously to match most of his transactions (thereby taking only the risk of daily short swings in the market), and run the risk of long-run price fluctuations on a small part of his trading merely reveals plaintiff's conservative trading position. The limited degree of his speculation does not, for the purposes here concerned, either change the nature of his trading activities or qualify his profits therefrom as self employment income rather than capital gains."

In the petitioner's activity, his hedging in concurrent futures, or as the Court below terms it, "matching", consisted of *simultaneous* transaction made during a market session by the purchase or sale of odd-lot futures and reverse hedging transactions in round-lot futures of the same option. The time lapse between the transactions was always a matter of seconds so that substantially all risks from price swings in the futures, with respect to his hedged position, were entirely eliminated.

The Appellate Court rests decision on the fact that a small portion, approximately 1%, of petitioner's transactions were unhedged. Such fractional part of petitioner's activity was speculative but the substantial portion, 99%, which was protected from price swing risks by hedging, was non-speculative.

Under these facts, to constitute petitioner's activity income capital gain income, requires a broad construction of the capital asset statute of the Social Security Act. Such broad construction is contrary to the rule of construction applied by this Court in Corn Products to #117 of the 1939 Revenue Act, having identical provisions with the Social Security statute. Quoting from such decision:

"Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. (p. 52) * * * * The preferential treatment provided by #117 applies to property which was not the normal source of business income. In was intended to relieve the taxpayer from excessive tax burdens or gains or losses resulting from a conversion of capital investments and to remove the deterrent effect of

those burdens on such conversions. Burnet v. Harmel, 287 U.S. at 106. Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic Congressional purpose. This Court has always construed narrowly the term "capital assets" in #117."

The third question presented herein is whether petitioner's activity as an Odd-lot Futures Specialist was engagement in the business of a dealer in commodity futures so as to bring his activity income within the statutory capital gain income exclusions of the Social Security Act and constitute self-employment income under the said Act.

The Referee decided this question adversely to petitioner. It was presented to the Appellate Court which did not mention this issue in its decision but by its affirmance of the Secretary's decision, affirmed the decision of the referee.

Section 211 (a) of the S.S. Act, 42 U.S.C. 411 (a), provides, in pertinent part:

> The term "net earnings from self-employment" means the gross income, as computed under Chapter 1 of Title 26, derived by an individual from any trade or business carried on by such individual * * *; except that in computing gross income * * *
>
> (3) There shall be excluded any gain or loss (A) which is considered under Chapter 1 of Title 26 as gain or loss from the sale or exchange of a capital asset, * * * or (C) from the sale, exchange, involuntary conversion or other disposition of property if such property is neither (i) stock in trade or other property of a kind which would properly be includible in inventory if on hand at the close of the taxable year, nor (ii) property held primarily for sale to customers in the ordinary course of the trade or business, * * *".

Section 117 (a) of the 1939 Internal Revenue Code and #1221 (1) of the 1954 Code exclude property from being

capital assets identical with the property excluded in (i) and (ii) of the Social Security statute:

> "For the purposes of this subtitle, the term 'capital asset' means property held by the taxpayer * * *, but does not include —
>
> (1) Stock in trade or the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

Petitioner belives that his activity on the Chicago Board of Trade constituted the business of a dealer in commodity futures; that his inventories of odd-lot wheat futures were valuable property and his stock in trade acquired for the sole purpose of sale to his customers who were the cash dealer members of the Chicago Board of Trade. These facts bring petitioner's income within the express exclusions from capital gain treatment contained in the above statutes and constitute it self-employment income under the Social Security Act. The Appellate Court, in affirming the referee decision, construed the exclusions of the aforesaid capital gain statutes narrowly and in conflict with Corn Products wherein this Court favored a broad construction.

This proceeding concerns remedial statutes wherein the intention and purpose of Congress, as shown by its many amendments to the original Social Security Act, has been directed toward liberalizing its provisions and the administration thereof in favor of coverage to include additional groups and persons eligible to social security benefits.

To implement congressional intent and purpose, the courts have always favored a liberal construction in the administration and interpretation of the Act's provisions.

The Court so held in Burger v. Social Security Board, 66 F. Supp. 619-28 at page 626:

"It is well settled that the Social Security Act should be liberally construed in favor of those seeking its benefits. All doubts of interpretation are to be reseolved in favor of coverage. Helvering v. Davis, 1937, 301 U.S. 619, 640-645*** Grace v. Magruder, 1945, 80 U.S. App. D.C. 53, 148 F. 2d 679; Carroll v. Social Security Board, 7 Cir. 128. Fed. 2d 76-81.

The administrative decisions in this case have been arbitrary to the extent of ignoring record facts and substituting therefor abstract facts to support factual findings. There was here concurrence in sueh action by the appellate Court in affirming the Secretary's decision. Accordingly, the Appellate Court's decision in conflict with the foregoing rule of liberal construction of the provisions of the Social Security Act in favor of one seeking its benefits.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the petition for a writ of certiorari be granted.

EDWARD J. BRUNENKANT,
Attorney Pro Se.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 13715 SEPTEMBER TERM, 1962
SEPTEMBER SESSION, 1962

EDWARD J. BRUNENKANT,
Plaintiff-Appellant,
v.
ANTHONY J. CELEBREZZE, Secretary of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 31, 1962.

Before KNOCH, CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* Edward J. Brunenkant, plaintiff-appellant, brought this action in the District Court, pursuant to 42 U.S.C.A. § 405(g), to review a final decision[1] of the Secretary of Health, Education and Welfare denying the claims of plaintiff and his wife for old-age insurance benefits under the Social Security Act.[2] The District Court granted summary judgment for the defendant-appellee and the plaintiff appealed.

1 The final decision is a decision by the Appeals Council of the Social Security Administration affirming a decision made by a referee (hearing examiner) of the Administration.

2 Title II of the Social Security Act (42 U. S. C. A. §§ 401-425 (referred to herein as "Act".

Plaintiff and his wife applied for old-age insurance benefits on January 15, 1958. Denial of the applications led to the subsequent administrative proceeding and judicial review action which culminated in this appeal. Plaintiff had reached retirement age on December 21, 1957. Under the then applicable provisions of the Act, in order to qualify as fully insured for old-age insurance benefits, he was required to have either 13 quarters of coverage among the 27 quarters elapsing between January 1, 1951 and September 30, 1957 or at least 7 of the 11 quarters elapsing between January 1, 1955 and September 30, 1957. It is conceded that the limitation period of the Act (42 U.S.C.A. § 405(c)) makes uncontestable plaintiff's claim to 4 quarters of coverage during 1953 upon income he reported for that period as creditable self-employment income. Plaintiff claims that the record establishes that he received income creditable as self-employment income or as wages during the years 1955, 1956 and 1957 which for old-age insurance coverage purposes supplies the necessary additional quarters, or in itself constitutes the requisite quarters of coverage, for his qualification as fully insured.

We recently had occasion to point out (*Sherrick* v. *Ribicoff*, 7 Cir., 300 F. 2d 494, 495) that under the provisions of § 205 (g) of the Act (42 U.S.C.A. § 405(g)) the factual findings of the Secretary, if supported by substantial evidence, are conclusive and that this finalty attaches not only to the findings themselves but also to the inferences and conclusions drawn from the facts if a substantial basis for them appears in the record.

Thus the contested issue presented for our determination by plaintiff's appeal is whether the Secretary's findings and conclusions that the plaintiff did not in the years 1955, 1956 and 1957 receive income creditable for old-age insurance coverage purposes are supported by substantial evidence and based upon the application of correct legal criteria.

Plaintiff contends that his 1955-1957 income or earnings from futures trading on his own account as an "odd-lot- specialist" in wheat futures on the Chicago Board of Trade are creditable as self-employment income. He further contends that he received other 1955-1957 earnings from a corporation of which he was president which are creditable as wages or, in the alternative, that the 1956-57 portion of such earnings is self-employment income received for legal services rendered the corporation.

The basic facts are not in dispute. The record establishes that the plaintiff is a licensed attorney. For a number of years, including the 1955-1957 period, he was a member of the Chicago Board of Trade, a commodity exchange, and engaged in buying and selling of wheat futures as an odd-lot specialist. In addition he traded as a speculator in futures of other commodities. An odd-lot specialist is one who, in contrast to the usual futures trading in "round" lots of 5,000 bushels restricts himself to the buying and selling of smaller quantities of a particular commodity. A distinctive feature of an odd-lot specialist's transactions in futures is the ⅛ of a cent margin involved. Odd-lot futures are bought for ⅛ cent per bushel below, and sold for ⅛ cent per bushel above, the current market price.

Plaintiff's contention that his profits from his odd-lot specialist trading constitute creditable self-employment income was rejected by the final administrative decision of the Secretary affirmed by the District Court. We perceive no error in that ruling. Profits from futures trading are considered for income tax purposes as gains from the sale or exchange of capital assets. *Faroll* v. *Jarecki*, 7 Cir., 231 F. 2d 281, cert. den., 352 U.S. 830. Therefore, such profits are clearly within the express exclusion of § 211(a) (3) (A) of the Act (42 U.S.C.A. 411(a) (3) (A)), and are to be disregarded for the purposes of computing self-employment income under the Act. In *Faroll* we distinguished *Corn Products Refining Co.* v. *Com-*

missioner, 350 U.S. 46 as a case where such profits were held to constitute ordinary income and not capital gains because of the hedging aspect there involved *and* the fact that the future transactions were an integral part of the taxpayer's manufacturing business. In that case a manufacturer of corn products purchased corn futures in order to protect its manufacturing operations against a price increase in its principal raw material and to assure a ready supply for future manufacturing requirements without providing storage facilities. It took delivery of some of the corn according to its needs and sold the remainder at a profit. The futures transactions there involved afforded partial insurance against the principal risk of its manufacturing enterprise—a price rise in the raw material. The taxpayer's sales policy, selling its products for future delivery at a set price or at market price on the date of delivery, whichever was the lower, left it exceedingly vulnerable to rises in the price of corn.

Plaintiff's reliance upon *Corn Products* is misplaced. Plaintiff was not a manufacturer, processor or handler of the actual commodity but merely a trader in futures of the commodity who did not contemplate taking possession of the "actuals". Moreover, although plaintiff attempted to maintain a balance in his futures commitments, as nearly as market conditions would permit, the record does not disclose that his purchases and sales were ever perfectly matched. And to the extent that his futures commitments remained unmatched he took the full risks of price swings. In addition the illustrative daily trade records submitted by the plaintiff reflect the realities of the market. There was no matching of each purchase or sale at identical prices and his profit (or loss) consisted of both the ⅛ cent per bushel margin exacted for odd-lot transactions, a built-in capital gain in such transactions, and the price differential between the matched transactions. The fact that plaintiff chose contemporaneously to match most of his transactions (thereby taking only the risk of the daily short swings in the market), and run the risk of long-run price fluctuations on a

small part of his trading merely reveals plaintiff's conservative trading position. The limited degree of his speculation does not, for the purposes here concerned, either change the nature of his trading activities or qualify his profits therefrom as self-employment income rather than capital gains.

The evidence concerning receipt of wages by the plaintiff during the 1955-1957 period, except for certain entries in the records and tax returns of Commodity Investment Corporation, consists of plaintiff's testimony that in 1955 he was paid $3,576.00 in cash as salary by the corporation, and in 1956 and 1957 he was given notes of the corporation for $3,576.00 and $3,673.48, respectively, in payment of salary, which notes were exchanged for stock issued by the corporation in 1960 for their payment.

Commodity Investment Corporation was formed by the plaintiff, his wife, and his daughter, who comprised its board of directors. It was capitalized at $1,000 represented by 1,000 shares of common stock authorized and issued. Plaintiff, the corporation's president and treasurer, owned the controlling interest. The remaining stock was owned by plaintiff's wife, the corporation's secretary, and by his daughter, and his son. Neither the wife nor the daughter received any compensation for services as officer or director of the corporation. The corporation's address was that of plaintiff's residence; it had no telephone listing, nor did its name appear on any corporate registry other than that published by the state of its incorporation. The corporation's bank account carried a nominal balance of from $200.00 to $400.00.

The corporation had no income prior to 1955 at which time it commenced trading operations. Although its charter permitted of a broader range of activities the corporation's actual activity was limited to commodity trading on the Chicago Board of Trade where it availed itself of plaintiff's membership. Its primary "asset" was the privilege afforded by plaintiff's Board of Trade membership and its income was solely

the product of the use made of that membership in trading activities.

In 1955, the corporation's gross receipts were $4,500. Its balance sheet for that year discloses a net profit of $6.00 after deduction of $294.00 in expenses other than $4,200.00 listed as "salaries." In 1956 and 1957 the corporation sustained net operating losses of $3,974.84 and $2,671.03 according to its balance sheets and the plaintiff testified he was given notes for his salary. In 1958 the corporation decided to pay pay salaries only if it made money and provided that each officer was to receive a stated percentage of annual net earnings. In that year on gross receipts of $728.00 a net operating loss of $21.97 was sustained.

The administrative finding and conclusion that plaintiff's family corporation was utilized as a mere device to secure social security coverage through a personal activity of the plaintiff which was otherwise barred from such coverage finds substantial support in the record. The evidence considered as a whole, including the inferences which have a reasonable and substantial basis therein, support the conclusion that during the years 1955-1957 the sole function of the corporation was its utilization by the plaintiff as a device to create a sham employment relationship for the sole purpose of attempting to convert his non-creditable earnings from futures trading into creditable wages. The corporation was a family corporation under plaintiff's sole and complete control. Its sole income producing activity involved the use of his exchange membership. The regularity and validity of its organization does not serve to overcome the fact that its "corporate shell" was diverted to the purpose of serving as a channel through which plaintiff's membership on the exchange might serve to produce "wages" creditable to him for social security purposes. *Cf. Higgins v. Smith*, 308 U.S. 473, 476-478; *Hoggatt v. Folsom*, E. D. Pa., 160 F. Supp. 490, affirmed 253 F. 2d 680 (C.A. 3). Although the corporation was organized in 1953 it was not until

1955 that it commenced trading activities. Early in 1955 plaintiff had learned that his gains from futures trading on his own account, because of the reversal of an earlier Bureau of Internal Revenue ruling, would no longer be regarded as creditable self-employment income. And, it was not until that same year that he was voted a salary as president and treasurer of the corporation.

Moreover, although the corporation remitted the social security taxes due on the salary plaintiff testified he was paid, he presented no evidence to corroborate the receipt of the $3,576.00 cash salary payment for 1955. His testimony as to the nominal bank balance of the corporation appears inconsistent with such a payment. The 1956 salary note was not produced. The evidence of the 1957 payments are the notes which in turn were redeemed in 1960 by the issuance of stock which, in the light of the evidence concerning the corporation's financial structure and net operating losses, would appear to be worthless.

Nor are we persuaded by plaintiff's alternative contention that the 1956-1957 portion of his earnings from the corporation was self-employment income attributable to services rendered the corporation as a lawyer. The contention is wholly inconsistent with the documentary evidence presented and relied upon by the plaintiff—material of the plaintiff's own making—to establish his receipt of "wages" from the corporation and it is in direct conflict with the declarations made in his application for benefits that his self-employment earnings as a lawyer for each of those years was less than $400.00. Plaintiff points to a 1953 entry in the corporate minutes that plaintiff was to be paid for legal services performed "in his individual capacity as a practicing lawyer" in connection with the qualifying and underwriting of an issue of $1,000,000.00 of cumulative prefered stock authorized by the charter. But the compensation so authorized appears to bear no relationship to the $4,200.00 salary the directors resolved in each of the years 1955, 1956 and 1957 to pay the plaintiff "as President and Treasurer" of

the corporation. The payments plaintiff claims to have received were in the latter amount (less tax deductions). The amount was also the maximum annual wages creditable for social security purposes.

The judgment order of the District Court is affirmed.

AFFIRMED.